

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

74-2483

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
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UNITED STATES OF AMERICA,

Appellee,

-against-

ALLEYNE F. ROBINSON, JOSE
ANTONIO ACOSTA ALVAREZ, and
JOSEPH M. VILLEGAS,

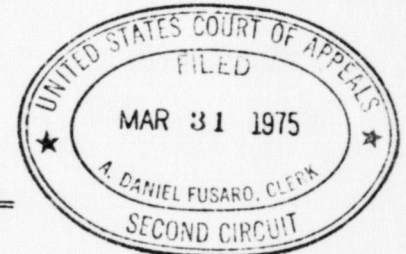
Appellants.

Docket No. 74-2541

Docket No. 74-2492

Docket No. 74-2483

PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC
ON BEHALF OF
JOSEPH M. VILLEGAS



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JOSEPH M. VILLEGAS
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

5

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This petition for rehearing with suggestion for rehearing en banc is filed pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure from an opinion* and judgment of this Court (Anderson, Mulligan, VanGraafeiland, C.JJ.) entered on March 17, 1975.

*The opinion is annexed as "A" to this petition.

The issue on appeal to this Court was whether 29 U.S.C. §501(c)* included within its scope the misuse of union forms to permit membership in a preferred group of those who did not qualify.

Section 501 creates a fiduciary duty on union employees and officials, and then creates civil remedies and criminal penalties for breach of those duties. The fiduciary duties of §501(a)** are broader than the criminal liability created by §501(c). Section 501(a) sets up a two-pronged duty. The

*Section 501(c) states:

Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

**Section 501(a) states:

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

first is to hold the union's money and property for the benefit of the organization and its members, and to manage, invest, and expend the same in accord with the union's governing rules. The second obligation is to avoid relationships adverse to the union, and conflicts of interests. On the other hand, the criminal provision prohibits embezzlement, stealing, and unlawful conversion of union moneys, funds, securities, property, or other assets.

The legislative history of the statute reveals that the Congressional intent was to make §501(a) greater in scope than §501(c) (the portion of appellant Villegas' brief outlining the complex legislative history is annexed as "B" to this petition), and that history would indicate that the criminal penalties of §501(c) were limited to financial damage or injury to the unions. Thus, the conduct here might be violative of the fiduciary duty under §501(a) as a conflict of interest, but it is not punishable under §501(c).

This Court rejected the argument made by appellants, and stated:

There is no question but that the legislative history of the statute reveals that the Congress was principally concerned with the looting of union treasuries by union leaders for their personal profit. It is understandable that this kind of obvious abuse by union officials was the principal concern of congressional leaders in the hearings and debates which preceded the enactment of the statute in question. However, it is evident from the clear and unambiguous language employed by the statute that the behavior condemned is not limited to the embezzlement or conversion of union funds.

Slip opinion at 2326-2327.

This analysis by the panel is in conflict with United States v. Rivera, slip opinion 2263, 2286 (2d Cir. Doc. No. 74-2115, March 13, 1975), where this Court held that legislative history is appropriately consulted even if the language of the statute being applied is unambiguous, and where the Court limited the application of a criminal statute (18 U.S.C. §2114) despite its language. Thus, the decision of the panel in this case that there is "no question" that Congress was "principally concerned" with looting of union treasuries, coupled with the absence of any indication in the legislative history that there were other concerns before Congress, is contrary to Rivera.

Rivera is in accord with the view of the Supreme Court on the question of statutory interpretation:

In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

United States v. Bass, 404
U.S. 336, 347 (1971).

Since Congress did not speak to the issue of whether "property" meant that other than money or funds, or items which could be converted to financial gain for the union (see Rewis v. United States, 401 U.S. 808, 811-812 (1971)), any ambiguity on this question must be resolved in favor of appellants.

[This] being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity.

United States v. Enmons,
401 U.S. 396, 411 (1973).

United States v. Bass, supra, 404 U.S. at 348; Rewis v. United States, supra, 401 U.S. at 812; Bell v. United States, 349 U.S. 81, 83 (1955).

The Congress' failure specifically to include or discuss activity of the type involved here is also a basis for holding that §501(c) does not prohibit the conduct involved here because it would upset the state-federal balance. United States v. Bass, supra, 404 U.S. at 349; Rewis v. United States, supra, 401 U.S. at 812. Indeed, Congress has specifically applied this principle to cases involving labor union activities. Speaking of 18 U.S.C. §1951 (the Hobbs Act), the Court held that violent labor activity in the course of a legal strike was not within the scope of the Hobbs Act:

It would require statutory language much more explicit than that [ambiguous language] before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented invasion into the criminal jurisdiction of the States.

United States v. Enmons,
supra, 410 U.S. at 411.

Thus, the Congress' failure specifically to include activity of the type involved here in the statute now precludes application of §501(c).

Furthermore, in its opinion in this case, the panel, acknowledging that the "fact pattern is unusual," looked to cases involving money or funds to sustain its position (see, e.g.,

United States v. Silverman, 430 F.2d 106 (2d Cir. 1970). However, not only is this fact pattern "unusual," no case has been found by either counsel or this Court that is like it. As both this Court and the Supreme Court have stated, the Government's failure to prosecute under the statute in this context is indicative of the belief that Congress did not intend to have it so applied. United States v. Enmons, supra, 416 U.S. at 410; United States v. D'Amato, 507 F.2d 26, 27 (2d Cir. 1974).

CONCLUSION

For the reasons stated above, the judgment of this Court should be vacated, and a judgment should be entered reversing the judgment below and dismissing the indictment.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JOSEPH M. VILLEGAS
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

March 31, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 686, 698, 703—September Term, 1974.
(Argued February 20, 1975 Decided March 17, 1975.)
Docket Nos. 74-2483, 74-2492, 74-2541

UNITED STATES OF AMERICA,

Appellee,

—against—

ALLEYNE F. ROBINSON, JOSE ANTONIO ACOSTA ALVAREZ,
and JOSEPH M. VILLEGAS,

Defendants-Appellants.

Before:

ANDERSON, MULLIGAN and VAN GRAAFEILAND,

Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, Hon. Dudley B. Bonsal, *Judge*, for conspiracy to violate, and actual violations of, 29 U.S.C. § 501(c), which prohibits embezzlement, theft or conversion by a union officer or employee of any of the money or other property of a union.

Affirmed.

T. BARRY KINGHAM, Asst. United States Attorney,
New York, New York (Paul J. Curran,

United States Attorney for the Southern District of New York, Lawrence S. Feld, Asst. United States Attorney, of Counsel), *for Appellee.*

MANUEL TAXEL, New York, New York (Louis Noah Forman, New York, New York), *for Defendant-Appellant Alvarez.*

PHYLIS SKLOOT BAMBERGER, New York, New York (The Legal Aid Society, New York, New York), *for Defendant-Appellant Villegas.*

SAMUEL ZUCKERMAN, New York, New York, *for Defendant-Appellant Robinson.*

MULLIGAN, *Circuit Judge:*

These are appeals by Alleyne F. Robinson, Jose Antonio Acosta Alvarez and Joseph M. Villegas from judgments of conviction entered on November 7, 1974 in the United States District Court for the Southern District of New York after a two-week jury trial before Hon. Dudley B. Bonsal, United States District Judge. The indictment in various counts charged the three defendants with a conspiracy to violate, as well as substantive violations of, 29 U.S.C. § 501(c) by the conversion of the property of the National Maritime Union (NMU), where Robinson served as an official and his co-defendants as employees. The defendants were convicted on all counts on which they were tried. Robinson received a one-year suspended sentence, was placed on probation for one year and fined a total of \$1000 to be paid during the year of probation. Alvarez and Villegas were sentenced to probation for three months and a fine of \$250 to be paid within that time.

I

The NMU is a labor organization representing unlicensed seamen on commercial and Government vessels, including those operated by the Government's Military Sea Transportation Service (MSTS). The NMU divided seamen into groups for the purpose of allocating work. In 1968-70, only full-fledged members of the NMU were classified in Group I. Seamen who were in three lower groups could compete for jobs on a priority basis only after Group I seamen had been offered the opportunity. To qualify for Group I status a seaman had to have served at least 800 days at sea on NMU vessels within a five-year period. To establish eligibility for Group I status certain forms had to be completed by the applicant. If he had served on commercial vessels, he would complete a "white form" and furnish copies of "discharges" received at the end of a voyage to support his claim of time at sea. This information then had to be verified by the NMU staff at headquarters, where records were kept of Pension and Welfare Fund contributions by commercial employers; these contributions were computed according to the amount of each NMU member's seetime. If the seaman claimed MSTS service, he would complete a "green form" detailing his time at sea on MSTS vessels, which the union could verify by checking MSTS personnel files in Brooklyn. Upon verification a Group I union book and "blue card" would be issued and the seaman would pay a \$150 initiation fee and \$30 for quarterly dues thereafter.

Robinson, who was an elected official of the Union, acted as a liaison between the seamen aboard vessels in port and the shore-based union offices. He also maintain an office in the NMU hall in New York City, where his particular responsibility was to handle the processing of applications for seamen who claimed MSTS experience.

On trial, the Government produced nine seamen who had applied to Robinson for Group I status although they admittedly lacked the necessary experience at sea. Five of the seamen were introduced to Robinson by Villegas and Alvarez, who were respectively a Patrolman and a Master-at-Arms of the NMU. Villegas and Alvarez charged the seamen fees ranging from \$500 to \$750 to get Group I classification.¹ The Government's proof established that, in the case of six seamen who had executed the green (MSTS service) forms, when the forms were returned by Robinson they contained entries of sea service which were false and had not been given to Robinson. All of the forms when returned to the NMU from the Brooklyn MSTS office bore the signature of E. U. Maynard in the space for verification by the personnel office of MSTS. Although Mrs. Maynard did not appear as a witness, the Government's theory was that she, as one of the two clerks in the MSTS office, was acting in concert with Robinson to verify falsely the forms which noted sea service which had never taken place.

On appeal, Alvarez and Villegas challenge, *inter alia*, the sufficiency of the evidence on both the substantive and conspiracy counts. In view of the evidence of illicit payments by seamen to each man and their presence when these seamen executed forms in blank in order to procure Group I status, the claim that the evidence was insufficient is of no substance. Several other points raised by the appellants are frivolous.

II

The only argument raised on appeal which merits discussion is the position taken by all the appellants that

¹ These five seamen paid fees to Alvarez or Villegas prior to meeting with Robinson. Other seamen paid various amounts, up to \$850, to Robinson or unknown co-conspirators when the application forms were signed.

the conduct which was the basis for the indictment and conviction here does not constitute a crime under 29 U.S.C. § 501(c). At the end of the trial, all defense counsel renewed their motions to dismiss on this ground, and Judge Bonsal denied the motions in a memorandum dated November 7, 1974.

Section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959 provides:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

The theory of the Government is that the defendants conspired to convert, and that Robinson, aided and abetted by Alvarez and Villegas, did in fact convert to their own use and personal profit, the Group I application forms which were NMU property. The contention of the defendants was and is that the forms which were converted had no value and that the NMU actually profited from the activity of the defendants, who enriched the treasury of the NMU by adding new paying members. The argument continues that the legislative history of the statute demonstrates that, although broad fiduciary responsibilities for union officials were established in section 501(a)²

² Section 501(a) provides in pertinent part as follows:

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property

of the statute, the criminal conversion and embezzlement subdivision, section 501(c), was not given a similarly broad scope. It is urged that, while the conduct involved here may constitute a violation of the fiduciary obligations of the defendants, the remedy is properly a civil action by the union or its employees under section 501(b),³ which implements 501(a), but not a criminal proceeding under 501(c).

There is no question but that the legislative history of the statute reveals that the Congress was principally concerned with the looting of union treasuries by union leaders for their personal profit.⁴ It is understandable that

solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

- 3 Section 501(b) provides in pertinent part as follows:

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.

- 4 For example, Senator McClellan, Chairman of the Senate Select Committee on Improper Activities in the Labor-Management Field, and Senator Custis discussed on the floor of the Senate the union corruption at which the legislation was aimed:

Mr. McClellan. That is correct. In the select committee we found many instances of violations of that trust. Probably the most fla-

this kind of obvious abuse by union officials was the principal concern of congressional leaders in the hearings and debates which preceded the enactment of the statute in question. However, it is evident from the clear and unambiguous language employed by the statute that the behavior condemned is not limited to the embezzlement or conversion of union funds. The statutory language condemns the embezzlement or conversion not only of moneys, funds and securities, but also of "property, or other assets of a labor organization . . . directly or indirectly . . ."

It cannot be disputed that the green and white forms here were converted by the defendants and that they constituted union property. The argument that there was no violation of the statute because the forms had no intrinsic value is not persuasive. In the first place, the

grant instance was the Beck situation. Instead of assuming his responsibility and the obligation to handle union money as if it belonged to the union, he simply handled it for his own personal profit and gain. In other words, he pilfered nearly \$400,000 of union funds, as we discovered.

....
Mr. Curtis. We uncovered a number of instances wherein union funds and profits were handled by corrupt officers, just as though they had a proprietary interest in the money.

Mr. McClellan. Yes.

Mr. Curtis. That situation obtained in some of the Johnny Dio unions in New York. It also was true of the operating engineers in San Francisco. In a number of cases individuals handled union money without regard to who owned the money.

Mr. McClellan. Yes. I may remind my distinguished colleague—and I say this for the information of all Senators—that the Teamsters' Union in St. Louis was bought out and paid off. The officers were, in effect, bought out and the union was turned over to the person who is there now, Gibbons. How was that money obtained? The retirement pay money was used.

Mr. Curtis. Or severance pay.

Mr. McClellan. Yes. The retirement or severance pay money was given to the officers who were bought out.

I do not think the union members, the working people, pay their dues in the unions for that sort of manipulation. If we establish a fiduciary responsibility under the law, I do not think union officers could perpetrate such acts.

statute does not require that the property be of any particular value. The forms obviously were not taken to be used as scrap paper or to make paper hats. When, through the connivance of the defendants, the forms were filled in with false information, their value to the unqualified seamen was great enough to persuade them to pay \$500 to \$850 to the defendants to receive an NMU union book and blue card.⁵

The contention that there was no statutory violation since the NMU lost nothing and in fact benefited by the transaction to the extent that it obtained the dues of new members is not convincing. The new members were spurious and presumably the privileges of Group I membership are dependent upon meaningful experiential norms which have been established in good faith by the union. The erosion of these standards by the meretricious machinations of the defendant officials and employees constituted a breach of trust which cannot possibly be characterized as a benefit to the union. The only beneficiaries were the defendants who were selling fraudulent union credentials. The fact that union funds were not depleted does not remove the case from the reach of the statute. One of the aims of the criminal provision here involved was to preclude the unjust enrichment of union officials and agents, which was precisely what occurred here. The allocation of jobs by priority is certainly a

⁵ This situation is analogous to the stealing of blank checks, belonging to the United States, with an intrinsic value of a total of six cents, which was held to violate a statute making it a crime to steal "any kind or description of property belonging to the United States." *Keller v. United States*, 168 F. 697 (7th Cir. 1909) (*per curiam*). The intrinsic value of the converted forms in this case is similarly very small and the statute violated is similarly broad, prohibiting the conversion of "any of the . . . property . . . of a labor organization" See also *Lotto v. United States*, 157 F.2d 623, 629 (8th Cir. 1946), cert. denied, 330 U.S. 811 (1947); *Donegan v. United States*, 237 F. 641, 646 (2d Cir. 1922), cert. denied, 260 U.S. 751 (1923); *Clark v. United States*, 268 F. 329, 331 (6th Cir. 1920).

principal benefit of union membership and, insofar as the process was thwarted and frustrated by the scheme employed here, the union and its bona fide members suffered a loss which, although not readily calibrated in terms of dollars, is nonetheless real. The statute here does not attempt to draw common law distinctions between grand and petit larceny, as it well could have,⁶ but is addressed to defendants who embezzle, steal or unlawfully and willfully abstract or convert *any* of the property of a labor organization. Such conduct was engaged in by the defendants in this case.

Although appellants claim that this is a case of first impression, that is true only to the extent that the fact pattern is unusual. However, this court has had the obligation to construe section 501(c) on previous occasions.⁷ In *United States v. Silverman*, 430 F.2d 106 (1970), cert. denied, 402 U.S. 953 (1971), Judge Friendly pointed out that in section 501(c), as in other comparable criminal provisions, the Congress has

6 See, e.g., 18 U.S.C. §§ 641, 643, 644 & 648; N.Y. Penal Law §§ 155.25 to 155.35.

7 Most of the litigation in this circuit arising under the statute has concerned alleged violations of section 501(a) and relief has been sought under section 501(b). We have consistently given a relatively narrow interpretation to these provisions, refusing to intervene in matters which we have considered to involve simply the internal operations of a union. *Head v. Brotherhood of Railway Clerks*, slip op. 2077 (Mar. 7, 1975); *Coleman v. Brotherhood of Railway Clerks*, 340 F.2d 206 (1965); *Gurton v. Arons*, 339 F.2d 371 (1964). We have, however, made it clear that those sections do apply "to fiduciary responsibility with respect to the money and property of the union" *Gurton v. Arons*, *supra*, 339 F.2d at 375. To the same effect, *Head v. Brotherhood of Railway Clerks*, *supra*, slip op. at 2083 n.3. Other circuits have given a broader reading to section 501(b). E.g., *Pignotti v. Local #3, Sheet Metal Int'l Ass'n*, 477 F.2d 825 (8th Cir.), cert. denied, 414 U.S. 1067 (1973); *Sabolsky v. Budzanoski*, 457 F.2d 1245 (3d Cir.), cert. denied, 409 U.S. 853 (1972).

gone beyond the common law offense of larceny and the old statutory crime of embezzlement because "gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches," *Morissette v. United States*, 342 U.S. 246, 271-272, 72 S.Ct. 240, 254, 96 L.Ed. 288 (1952). But, as was there held, despite minor variations in language the common thread is that the defendant, at some stage of the game, has taken another person's *property* or caused it to be taken, knowing that the other person would not have wanted that to be done.

430 F.2d at 126-27 (emphasis added).

The Court in *Silverman* also essentially defined the unlawful and willful conversion of union property:

It is easy to understand how a union employee does this when he "unlawfully and willfully" uses union funds in a manner that works to the personal benefit of himself or the payee and does not benefit the union, whether or not the union went through the form of authorization; the "union" presumably would have objected if it had been able to speak freely.

430 F.2d at 127. See also *United States v. Ottley*, slip op. 1181, 1185-87 (2d Cir. Jan. 7, 1975).

In our view, the activities of the defendants here fall within Judge Friendly's description of the crime Congress intended to establish. They utilized the property of the union in a way which benefited themselves and not the union. Their action was not authorized and presumably the NMU and its membership would have objected had it been made known. The judgments must therefore be affirmed.

Affirmed.

ARGUMENT

THE ACTIVITIES CHARGED IN THIS IN-
DICTMENT ARE NOT PUNISHABLE UNDER
§501(c).

The District Court believed that the fiduciary obligations imposed upon union employees in section 501(a) of the Labor-Management Reporting and Disclosure Act rendered the activities of appellant Villegas subject to prosecution under section 501(c). However, an examination of the legislative history of section 501 establishes that Congress did not intend the criminal penalties of §501(c) to cover all facets of the fiduciary responsibility of subsection (a) and that the conduct alleged here is not covered by §501(c). To start with a summary, the history shows that embezzlement of funds and property was part of the Senate bill, that the bill also created a fiduciary responsibility of approximately the same dimensions as the criminal provisions, and that both were limited to "funds and assets." The House of Representatives bill broadened the fiduciary responsibility to include misuse of union position for personal gain. However, the criminal embezzlement statute was not expanded. The statute as finally enacted adopted the broad fiduciary duty and the limited criminal embezzlement provisions. Since the statute also includes sanctions for bribery, failure to keep accurate records, and conflicts of interests, these provisions are the ones applicable here.

A. The Senate

B

On January 20, 1959, the Kennedy-Ervin bill (S.505) was introduced in the Senate* in an attempt to provide the reforms shown to have been needed by the Senate Select Committee on Improper Activities in the Labor-Management Field (McClellan Committee).** 105 Cong.Rec. (Part 1) 883-884 (January 20, 1959).

*The Kennedy-Ervin bill derived primarily from the Kennedy-Ives bill that had been introduced in the Senate the prior year and passed by that body in June 1958. Section 109(a) of that bill was identical to section 109(a) of the Kennedy-Ervin bill. The Kennedy-Ives bill was criticized because it contained no provision creating fiduciary responsibility (e.g., 105 Cong. Rec. 11482 (June 17, 1958)).

**After one year of hearings, on March 24, 1958, the McClellan Committee issued its first interim report. In relevant part, the report found widespread misuse of union funds. Financial safeguards were lacking, audits were fraudulent, financial reports to members were false, officials dealt in cash, and vouchers were not submitted or were false, blank-signed checks were

That bill contained in its section 109(a) language virtually identical to the present section 501(c).^{*} Section 109(b) of the bill provided for a civil remedy by the union against anyone convicted under §109(a). The bill (§110(a)) also provided an amendment to Title 18 making it a crime to place a false entry on a labor union record with intent to injure, defraud, or mislead the union. Senator Kennedy, when introducing the bill, listed the basic sections, including criminal sanctions for embezzlement of union funds and false reporting or entries, and suits by union members for recovery of embezzled or misappropriated funds. Ibid.

On January 28, 1959, Senator Goldwater introduced the administration bill (S.748). The bill created a fiduciary duty of officers, agents, and other representatives of a union with respect to union money and property, and was an attempt to fill the gap left open in the Kennedy bill. 105 Cong.Rec. (Part 1) 1273 (January 28, 1959). It contained an identical criminal provision against embezzlement (§412(a)(1)); like the Kennedy bill provision, it was described as a criminal penalty for embezzlement of funds. 105 Cong.Rec. (Part I) 1287 (January 28, 1959).

given out to union officers, records were destroyed, and unauthorized and improper loans were made. Misuse of union funds totaled over \$10 million in union dues money. Proposed recommendations included regulation and control of union funds, including pension, health, and welfare funds.

^{*}The one difference is that §501(c) refers to "union," and §109(a) refers to an organization exempt under §501(a) of the Internal Revenue Act.

Then S.1137 was introduced by Senator McClellan. He included a provision to create fiduciary duties with respect to administration, disbursement, and reporting of funds by union officials (§301). 105 Cong.Rec. 2668 (February 19, 1959).

On April 15, 1959, the Senate bill as modified and amended was introduced as S.1555. The bill did not contain any provision containing fiduciary duties, referring only to a policy of trust, and contained the same criminal provisions for embezzlement of funds (§109(a)). There was no provision for criminal sanction for misstatements in internal union records, although it was a crime to falsify records required by statute to be kept by the union (see §108). Senate Report No. 187 on S. 1555 states the principal areas covered by the bill:

Labor organizations are creations of their members; union funds belong to the members and should be expended only in furtherance of their common interest. A union treasury should not be managed as the private property of union officers, however well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. The members who are the real owners of the money and property of the organization are entitled to a full accounting of all transactions involving their property.

The financial conduct of labor unions and their officers is a proper concern of the Federal Government. This is so because the funds that pass through union treasuries and for which unions and their officers are responsible are very large, and the uses to which these funds are put have a substantial impact on the Nation's economy. Furthermore, if unions are to enjoy the protection of rights such as are guaranteed to them by the National Labor Relations Act and the Railway Labor Act, they ought also to be held responsible for abuses that have

accompanied the exercise of these rights by some union leaders.

Similarly, the rules governing the conduct of the union's business, such as dues and assessments payable by members, membership rights, disciplinary procedures, election of officers, provisions governing the calling of regular and special meetings -- all should be known to the members. Without such information freely available it is impossible that labor organizations can be truly responsive to the members which they serve.

Id., at 8.

On racketeering, corruption, and conflicts of interests, the Report states:

Racketeering, crime, and corruption must be stamped out in the labor and management field as elsewhere. The committee bill carries strong measures for driving criminals from labor unions. Its provisions will also bring to light possible conflicts of interest and similar shadowy transactions through which unscrupulous union officials and employees sacrifice the welfare of employees to personal advantage.

Section 109 would create a new Federal crime of embezzlement of any funds of a labor organization. Conviction would carry a fine up to \$10,000 and 5 years' imprisonment.

Section 108 of the committee bill makes it a crime to willfully destroy, or make false entries in the books or records of unions, employers, and middlemen subject to the bill.

Id., at 12. Emphasis added.

Thus, the Report clearly distinguishes provisions which protect against conflict of interests and those which impose criminal sanctions for embezzlement of funds. Clearly, the first category more clearly defines the activities alleged here. The

Report goes on to state that conflicts of interests are treated by reporting and disclosure -- rather than by criminal sanctions, like embezzlement (Report, at 15-16).

Criticising S.1555 as ineffectively protecting union members by failing to include a fiduciary obligation, the statute, Senator Goldwater stated, makes embezzlement of funds a crime, something already the law of every State. 105 Cong.Rec. (Part 4) 5495 (April 8, 1959).

The minority of the committee also objected to the failure of S.1555 to include a provision creating a fiduciary duty by a union official with respect to funds and property. Report, at 72.

Thus, both the fiduciary duty that was suggested and the legislative provision that was included were continually referred to in the proceedings as provisions relating to "funds or assets: (e.g., Report, at 104; Goldwater, 105 Cong.Rec. (Part 5) 6461-6462 (April 22, 1959); Morse, 105 Cong.Rec. (Part 5) 6238 (April 17, 1959); Kennedy, 105 Cong.Rec. (Part 5) 7022 (April 29, 1959).

Senator McClellan, who was particularly distressed at the failure to create a fiduciary responsibility, spoke of it as relating to money and funds;

Mr. President, in the course of the long

series of hearings which the select committee conducted, relating to the serious misuse of funds, misappropriation of funds, looting of union treasuries, and so forth, we found in too many instances that corrupt labor officials regard a union treasury as something to be used for their own personal privilege and an opportunity to pilfer union funds almost at will. I do not believe present laws are adequate to deal with such abuses....

* * *

It should be provided as a matter of law that such officers will be acting in a fiduciary capacity. That is true of officers of other institutions who act as trustees or handle money in trust, or are considered fiduciaries by reason of being officers who handle money. But in the bill a declaration of policy is made that it is in the national interest. I simply say it ought to be provided in the bill that such officers have fiduciary responsibility.

* * *

It is absolutely for the protection of union funds [which belong to the members].... the union funds and the trustee funds.

* * *

[The amendment] simply imposes on the officer the responsibility which is imposed on every other officer who handles money transactions [that it makes him realize that the money belongs to others and that he is handling it in trust....] In the select committee we found many instances of violations of that trust. Probably the most flagrant instance was the Beck situation. Instead of assuming his responsibility and the obligation to handle union money as if it belonged to the union, he simply handled it for his own personal profit and gain. In other words, he pilfered nearly \$400,000 of union funds, as we discovered.

105 Cong. Rec. (Part 5) 6523
(April 23, 1959).

The Senators struggled with a definition of the fiduciary duty. Senator Ervin wanted to know if it meant something more than keeping money or property safe. Senator McClellan said no. Senator Ervin stated:

When the Kennedy-Ives bill was before the Senate last year, an amendment was offered concerning the undertaking to impose a fiduciary obligation without defining what was the fiduciary obligation. As I construe the amendment, the Senator [McClellan] is undertaking to define what is the nature of the fiduciary obligation by saying that the custodian of the property or the money of a union occupies the post of a trustee with respect to such money, and, if I correctly construe the language, the purpose is to make that person responsible for the safe-keeping of the money and for the devotion of the money to whatever purposes may have been authorized by the union.

105 Cong.Rec. (Part 5) 6525
(April 23, 1959).

Senator McClellan agreed with Senator Kennedy's phrasing that it was

... the purpose of the amendment to insist that a union officers who expend money shall not have a conflict of interest, and that they shall not attempt, through indirect means, to pilfer a union treasury for their own benefit....

105 Cong.Rec. (Part 5) 6526
(April 23, 1959).

Again, Senator Kennedy stated:

... As I understand the provision in his [Senator McClellan's] amendment, it refers not to the membership voting to do that which is legitimate so far as union business is concerned, but, rather, to prevent the membership from voting at a meeting, with only a few of the Members present, to

give excessive payments to a union officer for illegitimate purposes. It is to prevent the misuse of union funds by a majority at a meeting when that majority represents only a very small minority of the membership, and to prevent action which could perhaps involve the enrichment of certain union officers by a surreptitious deal.

Mr. McClellan: That is, generally, the object of the amendment. I cannot think of every purpose, and I do not know that anyone else can.

105 Cong.Rec. (Part 5) 6527
(April 23, 1959).*

Finally included in S.1555 was a fiduciary section (§610)

which read:

Every officer, agent, or other representative of a labor organization engaged in an industry affecting commerce, or of a trust in which such organization is interested, shall, with respect to any money or other property in his custody by virtue of his position as such officer, agent, or representative, have a relationship of trust to any such labor organization and the members thereof, or to any such trust and the beneficiaries thereof, and shall be responsible in a fiduciary capacity for such money or other property, notwithstanding any exculpatory clause or

*Senator Javits, concerned with providing a remedy for breach of any fiduciary duty included in the statute introduced §109(b). The section provided a civil suit "when any officer or employee of any labor organization is alleged to have embezzled, stolen, or unlawfully and willfully abstracted or converted to him own use or the use of another any money or property of the labor organization . . ." Senator Javits read this as a remedy for breach of a duty concerning money, and also for a conflict of interests and bribery. Others, however, including the members of the House of Representatives (see *infra*) did not agree that the language covered these last two categories. See also remarks of Senator Goldwater, 105 Cong. Rec. (Part 8) 10103 (June 8, 1959). This must mean that the identical language in the criminal provision was not meant by Congress to cover conflict of interest and bribery, and the word "property" was not meant by anyone to cover the forms involved here.

action purporting to exempt him from such responsibility.

As § 1555 was passed, it created a fiduciary duty as to money and property (§610) and included a civil remedy for breach of the trust by embezzlement, theft, or conversion of money and property (§209(b)) and contained the original criminal provision (§209(c)). Thus, the trust relationship and the criminal sanctions related to money and property, which had previously been said to mean "assets." Conflict of interests situations and outright bribery were handled in other criminal provisions. Conflicts were to be revealed by reporting provisions (§202(a)), and are made specific crimes. Bribery was made a crime by §302(b):

It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment or delivery of any money or other thing of value prohibited by subsection (a) with intent to influence him in respect to any of his actions, decision, or duties as a representative of employees or an such officer or employee of such labor organization.

In summarizing the statute, Senator Kennedy referred to criminal sanctions for embezzlement of funds and false representation, and a civil suit for recovery of funds embezzled or misappropriated. 105 Cong. Rec. (Part 5) 7022 (April 29, 1959).

B. HOUSE OF REPRESENTATIVES

In the House, H.R. 4473 created a fiduciary duty (§201(a)) on the part of a representative of a labor organization with respect to money or other property. This was included by Mr. Barden, who was shocked by McClellan Committee reports of embezzlement of union funds and property. There was also included a provision

making it a crime to embezzle funds or property and falsifying union records (§215).

A second bill, H.R.7680, included more extensive fiduciary obligations:

Sec. 201. No officer or agent of a labor organization shall, directly or indirectly --

(1) have or acquire any pecuniary or personal interest which would conflict with his fiduciary obligation to such organization;

(2) engage in any business or financial transaction which conflicts with his fiduciary obligation; or

(3) act in any way which subordinates the interests of such labor organization to his own pecuniary or personal interests.

The Committee (Elliott) bill (H.R.8342) and the Landrum-Griffin Bill (H.R.8400) contained identical provisions for fiduciary duties. 105 Cong.Rec. (Part 11) 14344, 14346 (July 27, 1959). For the first time, the fiduciary duty was expanded:

Sec. 501(a) [of H.R.8342]. The officers, agents, shop stewards, and other representatives of labor organizations occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expand the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the

interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

Discussing this bill, Mr. Brademas stated:

[There is an assertion that] a union official is left unaccountable for profits reaped while using his office (not union funds) to his personal advantage.

The facts: This is a complete misinterpretation. Section 501(a) explicitly requires union officials to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. The same section also forbids a union officer "from holding or acquiring any personal interest which conflicts with the interests of the organization." Section 501 (b) authorizes an individual member, when these rules are violated and the union fails to sue, to bring a suit "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization."

Daily Cong.Rec. A6572-3,
Appendix, July 29, 1959.

See also comments of Mr. Shelley (105 Cong.Rec. (Part 12) 15023 (August 3, 1959)), and Senator Morse (105 Cong.Rec. (Part 12) 14989-14990 (August 3, 1959)).

The House Report 741 on H.R.8342 states the following:

Section 501(c) would create a new Federal crime of embezzlement of any funds of a labor organization. Conviction would carry a penalty of a fine up to \$10,000 and 5 years imprisonment.

Report, at 9.

Later in the report, the following is stated:

The committee bill also contains provisions dealing with breaches of trust and other questionable transactions, which, although not seriously criminal, nevertheless are incompatible with a strong and honestly run labor movement.

For centuries the law of fiduciaries has forbidden any person in a position of trust subject to such law to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom he serves. Such a person may not deal with himself, or acquire adverse interests, or make any personal profit as a result of his position. The same principle has long been applied to trustees, to agents, and to bank directors. It should be equally applicable to union officers and employees. The ethical practices code of the American Federation of Labor and Congress of Industrial Organizations states:

It is too plain for extended discussion that a basic ethical principle in the conduct of union affairs is that no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a worker's representative.

Section 501 of the committee bill provides that the officers, agents, shop stewards, and other representatives of labor organizations occupy positions of trust in relation to such organization and its members as a group.

Report, at 10-11.

Still later, when discussing the fiduciary duty, the Report stated:

Union officials occupy positions of trust. They hold property of the union and manage its affairs on behalf of the members. It is the duty of union officers just as it is the duty of all similar trustees to put their obliga-

tions to the union and its members ahead of any personal interest.

The committee bill sets forth this principle unequivocally and declares that union officers and agents occupy positions of trust in relationship to labor organizations and their members. It then sets forth their duties in terms which the common law applies to all persons who undertake to act on behalf of others:

*** to hold its money and property solely for the benefit of the organization and its members and to manage, invest and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

We affirm that the committee bill is broader and stronger than the provisions of S.1555 which relate to fiduciary responsibilities. S.1555 applied the fiduciary principle to union officials only in their handling of "money or other property" (see S.1555, sec. 610), apparently leaving other questions to the common law of the several States. Although the common law covers the matter, we considered it important to write the fiduciary principle explicitly into the Federal labor legislation. Accordingly, the committee bill extends the fiduciary principle to all the activities of union officials and other union agents or representatives.

Report, at 81.

Thus, sections 501(a) and (b) are treated separately from section 501(c). Subsection (c) punishes only one aspect -- embezzlement of funds -- of the breach of fiduciary duty. What became §501(c) always included embezzlement of funds, and was never expanded as the provisions which became §§501(a) and (b) were enlarged. Not only the report, but the legislators as well, simply assumed this distinction. See remarks of Mr. Landrum (105 Cong.Rec. (Part 11) 1436 (July 27, 1959)), and of Mr. Elliot (106 Cong.Rec. (Part 14) 15549-15550 (August 11, 1959)).

The Senate ultimately adopted the House proposals, and a statement of Senator Goldwater summarized the effect of what became the law:

Section 501(a) provides that union officers, agents, shop stewards, and other representatives occupy positions of trust in relation to the union and its members as a group. It makes it their duty, taking into account the special problems and functions of a labor union, to hold the union's money and property solely for the benefit of the union and its members; to manage, invest, and expend the same in accordance with its constitution, bylaws, and any resolution of the union's governing bodies adopted thereunder; to refrain from dealing with their union as an adverse party or in behalf of an adverse party in any matter connected with their duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of the union; and to account to the union for any profit received by them in whatever capacity in connection with transactions conducted by them or under their direction on behalf of the union....

The Kennedy-Ervin bill (S.505), as introduced, contained no provision of any kind imposing fiduciary status and obligations on

union officials. In committee, minority members protested vigorously against this omission and urged an amendment to impose such status and obligations and for an effective remedy against any breach thereof. This amendment was rejected and instead a statement was included in the policy section of the bill as reported to the Senate -- in other words, in the preamble -- declaring it to be the policy of the United States to encourage the faithful observance by union officials of their fiduciary responsibilities by requiring them to file conflict-of-interest reports -- which the bill required anyway under title II -- and to file reports on all expenditures by them, for community welfare, educational or charitable purposes, loans, and other transactions involving union funds -- which were not required under the bill to be filed by them personally.

This statement in the preamble was a mere pious gesture, having no legal effect, providing no remedy for enforcement, and designed to create the misleading public impression that the bill effectively placed union officials in the status of fiduciaries, a status which the public was demanding.

On the Senate floor, an amendment was adopted, imposing a fiduciary status on union officials with respect to money or property in possession of such official by virtue of his office. No remedy for breach of such obligation was provided, nor did the amendment specifically provide that such officials were under a legal duty to refrain from engaging in conflict-of-interest transactions or holdings. The Landrum-Griffin bill both imposed the fiduciary status and provided a remedy for breach thereof. The conference report provided such remedy -- as described below -- and made it clear that involvement of a union official in a conflict-of-interest situation was a breach of his fiduciary responsibility.

Section 501(b) provides that when any such union official is alleged to have violated his fiduciary duties, and the union ... fail[s] to sue or recover damages ..., any member of the union ... may sue the official

in a Federal district court or a State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief -- including injunctive relief -- for the benefit of the union....

* * *

As indicated above, at no stage of the Senate bill was a remedy for breach of fiduciary duty provided. It is in both the Landrum-Griffin bill and the conference report.

Section 501(c) provides that any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor union of which he is an officer, or by which he is employed, directly or indirectly, shall be guilty of a felony and fined not more than \$10,000 or imprisoned for not more than 5 years or both.

This section makes embezzlement or any unlawful taking of union funds a Federal crime in addition to its already being a crime under all the laws of all the States. In addition, under section 501(b), described above, a union member may bring suit, where such an unlawful taking is engaged in by a union official, for breach of the fiduciary duty of such official.

105 Cong.Rec. (Part 15) 19765
(September 14, 1959).

The statute also includes as §505 an amendment to §302(b) of the 1947 Labor-Management Relations Act the provision against bribery included in the House bill and quoted above.

